



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of }
HERBERT J. AND SHEILA FRANKEL)

For Appellants: Leon B. Burstein
Certified Public Accountant

For Respondent: Bruce W. Walker
Chief Counsel

James C. Stewart
Counsel

O P I N I O N

This appeal is made pursuant to section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Herbert J. and Sheila Frankel against a proposed assessment of additional personal income tax in the amount of \$235.11 for the year 1974.

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The issue for determination is whether a change in the law increasing the period property must be held for capital gains treatment is applicable to installment payments received after the change in the law **from** a sale made prior **to** the change in the law.

On their 1974 personal income tax return, appellants reported income from an installment note which they received as a result of a corporate liquidation. The return indicated that the capital asset underlying the installment note was acquired by the corporation on April 1, 1969, and was sold on March 31, 1970. Appellants reported a capital gain resulting from the payment received on the installment note at the 65 percent rate on the basis that the asset was held **for more** than one year but not more than five years. Respondent determined that the asset had not been held for more than one year and issued a proposed assessment based upon the inclusion of that portion of the installment proceeds which represented gain at 100 percent pursuant to subsection (a) (1) Of section 18162.5 of the Revenue and Taxation Code. Certain other adjustments were made which were acquiesced in **by** appellants and are not, presently in issue.

The parties agree that appellants' right to capital gains treatment on the proceeds from the installment note, which was received from a liquidating corporation, **is determined by the corporation's holding period of the capital asset.** (See Rev. & Tax. Code, § 18164.) In computing the holding period the day on which the asset was acquired is excluded and the day on which the asset was sold is included. (See Harriet M. Hooper, 26 B.T.A. 758, 760 (1932); Rev. Rul. 70-598, 1970-2 Cum. Bull. 168.) As indicated, the asset **was** acquired on April 1, 1969, and sold on March 31, 1970. Thus, the corporation held the asset for one day less than a year rather than for more than one year as contended by appellants.

Section 18162.5 of the Revenue and Taxation Code, which was enacted in 1971 and effective in 1972, reads in part as follows:

(a) In the case of any taxpayer, only the following percentages of gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing taxable income.

(1) One hundred percent if the capital asset has been held for not more than one year.

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(2) Sixty-five percent if the capital asset has been held for more than one year but not more than five years. ... (Emphasis added.)

Prior to the effective date of 18162.5, the holding period for a "long term capital gain" was more than six months while the holding period for a "short term capital gain" was six months or less. (See Rev. & Tax. Code, § 18162 as it read prior to repeal by Stats. 1972, Ch. 1150, p. 2258, in effect November 27, 1972.)

Appellants contend that section 18162.5 which was not effective until 1972, cannot be applied to installment sales made before the statute was enacted. This same contention has been resolved adversely to the taxpayers in Andrews v. Franchise Tax Board, 275 Cal. App. 2d 653 [80 Cal. Rptr. 403] (1969). In Andrews the court held that when proceeds of an installment sale are received by the taxpayer in a year during which a different revenue law is in effect than was in force during the year of sale, the law existing at the time of such receipt determines whether the proceeds are capital gains or ordinary income. (See Andrews v. Franchise Tax Board, supra, 275 Cal. App. 2d at 659; see also Snell v. Commissioner, 97 F.2d 891 (1938); Harry B. Golden, 47 B.T.A. 94 (1942); Appeals of William S. and Camilla A. Andrews, et al., Cal. St. Rd. of Equal., June 28, 1965.)

Thus, section 18162.5 is applicable. Since the underlying asset which gave rise to the installment note and the proceeds therefrom was not held for more than one year, 100 percent of the gain realized during 1974 was taxable. Therefore, respondent's action was correct and must be sustained.



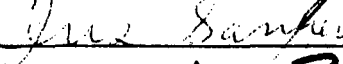
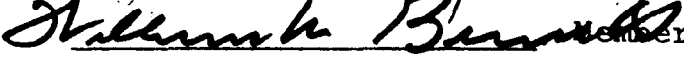
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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation **Code**, that the action of the Franchise **Tax Board** on the protest of Herbert J. and Sheila Frankel against a proposed assessment of additional personal income tax in the amount of \$235.11 for the year 1974, be **and the** same is hereby sustained.

Done at Sacramento, California, this 27th day of September, 1978, by the State Board of Equalization.


_____, Chairman

_____, Member

_____, Member

_____, Member
_____, Member